From:	(b) (6)
To:	Rothschild, Roxanne L.
Cc:	Kaplan, Marvin E.; Emanuel, William; McFerran, Lauren; Pearce, Mark G.
Subject:	Representation case procedures RFI - Request for an Extension of Time
Date:	Friday, February 2, 2018 3:34:38 PM
Attachments:	NLRB RFI Extension Request FINAL.pdf

Ms. Rothschild,

Attached, please find a letter signed by 16 trade associations requesting an additional 60 days beyond March 19, 2018, within which to respond to the Board's recent Request For Information concerning its representation-case procedures.

Please let me know if you have any questions. Thank you.

Best,

(b) (6)

(b) (6) **| Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**
1909 K Street, N.W., Suite 1000 | Washington, DC 20006 | Telephone: (b) (6) | Fax: 202-887-0866
(b) (6) @ogletree.com | www.ogletree.com | Bio

February 2, 2018

Roxanne Rothschild
Deputy Executive Secretary
National Labor Relations Board
1015 Half St. SE
Washington, DC 20570
roxanne.rothschild@nlrb.gov

Re: Representation-Case Procedures (RIN 3142-AA12), 82 Fed. Reg. 58783 (December 14, 2017); Request for Extension of Time to File Comments

Dear Ms. Rothschild,

The undersigned associations are writing to request an extension of 60 days from the current due date of March 19, 2018, within which to file responses to the National Labor Relations Board's ("Board" or "Agency") Request For Information regarding the Agency's Representation-Case Procedures published in the Federal Register on December 14, 2017.[1] While the undersigned groups appreciate the Board's recent 30 day extension of the original due date, for the reasons set forth below, an additional 60 days will substantially benefit the Board's record in this matter.

All of the undersigned associations have a vital interest in any developments affecting the administration of the National Labor Relations Act. Their members have vast experience with the Agency's Representation Case procedures both before and after their amendment in December of 2014. A great majority of the undersigned groups filed comments with respect to those amendments and participated in litigation involving those amendments following their adoption.

The undersigned believe that granting the requested extension would be of benefit to both the Agency and to the process of determining whether to retain, revise, or rescind the current procedural rules for two principal reasons.

First, we believe that a thorough review of the current election rules, and the effect of the 2014 amendments thereto, is best based on the actual experience of parties complying with the rules. Much of that information cannot be captured from data alone, and can only be obtained through surveying the actual experience of participants. The vast majority of employers that have participated in Board representation case proceedings both under the amended rules, and under the rules and procedures existing prior to 2014, are members of one or more of the undersigned. We believe that obtaining from those members their actual, real-world experiences under the amended rules would provide the Board with valuable information that would illuminate its subsequent decision to retain, revise or rescind the current rules. Identifying the appropriate member/parties, and obtaining the type of information that would prove useful to the Board, is, however, a time-consuming process. Accordingly, our requested extension is based, in large measure, on the time necessary to prepare and survey our members, receive, review and collate

[1] See, 82 FR 58783, Document No. 2017-26904

their responses, and incorporate the information in comment form for consideration by the Board.

Second, in addition to the experiential information noted above, we believe that relevant and appropriately analyzed empirical data may also be of use in both formulating our comments and in assisting the Board in its deliberative process. We require additional time to review and properly analyze all publicly available data; and, to the extent certain data may not be publicly available, to prepare an appropriate request to the Agency to provide such data, and to allow sufficient time for the Agency to respond.

Accordingly, for the foregoing reasons, we respectfully request an additional 60 days beyond the recent 30 day extension within which to respond to the Request for Information.

Sincerely,

American Hotel & Lodging Association
Associated Builders & Contractors, Inc.
Coalition for a Democratic Workplace
Council for Labor Law Equality
HR Policy Association
Independent Electrical Contractors, Inc.
International Foodservice Distributors Association
International Franchise Association
National Association of Wholesaler-Distributors
National Council of Chain Restaurants
National Grocers Association
National Restaurant Association
National Retail Federation
Retail Industry Leaders Association
Society for Human Resource Management
U.S. Chamber of Commerce

cc: Marvin E. Kaplan, Chairman, National Labor Relations Board
William J. Emanuel, Member, National Labor Relations Board
Lauren McFerran, Member, National Labor Relations Board
Mark Gaston Pearce, Member, National Labor Relations Board

From: (b) (6)
To: Emanuel, William
Subject: RE: SHRM conference information
Date: Friday, March 2, 2018 6:06:39 PM
Attachments: image001.png

Have a good weekend and I will call you Monday.

(b) (6)
Society for Human Resource Management
1800 Duke Street | Alexandria, VA 22314 USA
(b) (6) @shrm.org | +(b) (6)
shrm.org | @(b) (6) shrm

From: Emanuel, William [mailto:William.Emanuel@nlrb.gov]
Sent: Friday, March 02, 2018 5:54 PM
To: (b) (6) (b) (6) @shrm.org>
Subject: RE: SHRM conference information

Please call me to discuss this on Monday. There have been developments that would preclude some of this. My cell is (b) (6)

From: (b) (6) [mailto:(b) (6) @shrm.org]
Sent: Thursday, March 01, 2018 3:01 PM
To: Emanuel, William <William.Emanuel@nlrb.gov>
Subject: SHRM conference information

Bill,

I wanted to touch base with you regarding SHRM's conference and your session on March 12, 10:15 AM - 11:45 AM.

First, I want to confirm to make sure you are still available to participate in the conference and that your schedule has not changed.

Second, I wanted to describe, in more detail, what we envision for your session. The official description is at the bottom of this email.

The session is billed as an opportunity to hear from a Board member about the current status of the Board and what you anticipate for the remainder of 2018. We plan a discussion-style session with 2 SHRM facilitators, (b) (6) (HR consultant) and (b) (6) (employment attorney at Brown & Connery in New Jersey) posing questions for your comment. We would also give the audience members the opportunity to ask questions.
The Q&A style discussion will be casual and you can comment as much as possible,

recognizing there may be some issues you cannot fully discuss.

After a short introduction about the work of the NLRB, the facilitators will ask you questions about the following topics—of there are other topics that you think would be useful, please let me know:

1. Micro-units
2. Employer handbook cases
3. Purple communications and use of emails for communicating about unionization.
4. Ambush election rule – and the Request for Information process & what the Board is looking for
5. Joint employer
6. General Counsel directive and its implications

Please let me know if you are OK with this and still able to participate. If you would like, we can set up a conference call with the two facilitators to talk through the session ahead of time. Otherwise, there will be time for you to meet from 10:00 – 10:15 before the session starts.

The conference location:
The Renaissance Washington DC
999 Ninth Street NW
Washington DC 20001

Your session is in Congressional C.
The Speaker Office is Meeting Planner Office B

Your session description is as follows:

NLRB Update: An Insider's Perspective
03/12/2018 10:15 AM - 11:45 AM |
Location: Congressional C
● 1.25 SHRM PDCs
| Competencies: HR Expertise

| Intended Audience: Midlevel
Workplace Application:
Gain an understanding of current National Labor Relations Board (NLRB) decisions, learn about the likely direction of the new Board, and ask your questions about the work and priorities of the NLRB in 2018.
As the Trump administration NLRB is established, many of the decisions of the previous Board are being revisited. Join this session for a review of key Board decisions affecting the workplace and to hear from recently appointed NLRB member

William J. Emanuel about what to expect from the Board in 2018 and what's in store for both nonunion and union-represented workplaces. In this session, you will:

Learn about key NLRB decisions that have already been overturned.
Gain insight into how a newly constituted Board will approach workplace issues.
Learn what's anticipated in 2018 and have your questions answered!

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HR POLICY ASSOCIATION
The Association of Chief Human Resource Officers

August 27, 2018

William Emanuel
Member
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Re: HR Policy Association Fall Labor and Employment Conference

Dear Mr. Emanuel:

I am writing on behalf of the HR Policy Association to determine whether you would be available to speak at our Fall Labor and Employment Conference on Wednesday, November 14, 2018. Our meeting will be held at the Jones Day offices in Washington, D.C. We would like you to cover recent developments from the National Labor Relations Board including the status of various initiatives that the Board has undertaken involving joint employer rulemaking, election rule review, employer obligations regarding access to their email systems, and independent contractor case law developments that would be of interest to our members. Our members are, as you are aware, generally the senior labor and employment representatives for their respective companies. We are just in the process of putting our agenda together and could be flexible as to the time of your remarks on the 14th. Ideally, we would like you to make remarks for approximately 35-40 minutes followed by an approximate 15-20 minute Q&A.

Bill, I hope that you can join us for our Fall Labor and Employment Conference. Please have a member of your staff contact me if you need additional information.

Sincerely,

(b) (6)
(b) (6)
(b) (6) @hrpolicy.org
(b) (6)

From:	(b) (6)
To:	Emanuel, William
Cc:	Zick, Lara S.
Subject:	HR Policy Association Fall Labor and Employment Conference
Date:	Monday, August 27, 2018 2:18:19 PM
Attachments:	William Emanuel Invitation.pdf

Good Afternoon,

Please find the attached invitation to speak at the Fall HR Policy Association Conference from (b) (b)

Thank you,

(b) (6)
(b) (6)
Office (b) (6)
Fax: (614) 423-2991

From: (b) (6)
To: Rothschild, Roxanne L.
Cc: Ring, John; McFerran, Lauren; Kaplan, Marvin E.; Emanuel, William; Lucy, Christine B.
Subject: Re: ABA Labor & Employment Law Conference Board session discussion
Date: Tuesday, September 18, 2018 4:06:33 PM

Thank you, Roxanne. I appreciate your follow up email from today's conference call. I will review and share with Stuart Buttrick.

(b) (6)

Sent from my iPhone

> On Sep 18, 2018, at 3:53 PM, Rothschild, Roxanne L. <Roxanne.Rothschild@nlrb.gov> wrote:
>
> All:
>
> Below is the list of topics discussed during this morning's call for the Board's session at the ABA's Labor & Employment Law Conference on November 8, 2018.
>
>
> · Rulemaking regarding the Board's Joint-Employer Standard (comment period closes 11/13/2018)
>
> · Requests for briefing in Caesar's and Loshaw
>
> · Enhanced Board ADR Program
>
> · Boeing & Murphy Oil cases – what the Board is doing to handle these cases
>
> · Status of comments on the Election Rule Request for Information
>
> · ALJ Appointments found to be valid
>
> I have also attached documents that the Board may wish to provide to the ABA as documents to be distributed to conference attendees. The documents attached are:
>
>
> · Press Release re: Board's proposal to change its Joint-Employer Standard
>
> · Federal Register publication of Board's Notice of Proposed Rulemaking re: Joint-Employer Standard
>
> · Notice and Invitation to File Briefs in Caesar's Entertainment Corp.
>
> · Notice and Invitation to File Briefs in Loshaw Thermal Technology Corp.
>
> · Press Release re: Enhanced ADR Program
>
> · ADR promotional flyer that is sent out when ALJ Decisions issue
>
> · Press Release re: ALJs validly appointed
>
> I have also attached the Press Release regarding the comprehensive internal ethics and recusal review. I didn't know if you would want to talk about this or include this document.

>
> I will schedule another call to include (b) (6) for sometime in October. I will also set up a meeting with Lori Ketcham to take place shortly before the ABA conference to cover reminders regarding ethical obligations as to the speaking engagements.
>
> Thanks,
>
> Roxanne Rothschild
> Deputy Executive Secretary
> National Labor Relations Board
> 1015 Half Street SE, Office 5010, Washington, DC 20570
> roxanne.rothschild@nlrb.gov<mailto:roxanne rothschild@nlrb.gov> | 202-273-2917
>
> <Press Release - Board Proposes Rule to Change its Joint-Employer Standard.pdf>
> <Federal Register publication of NLRB Notice of Proposed Rulemaking regarding Joint-Employer Standard 9-14-2018.pdf>
> <Notice and Invitation to file briefs in Caesars Entertainment Corp.pdf>
> <Notice and Invitation to file briefs in Loshaw Thermal Technology.pdf>
> <Press Release - NLRB Launches Pilot of Proactive Alternative Dispute Resolution (ADR) Program.pdf>
> <ADR ALJD Issuance Insert Pilot Proactive Program.pdf>
> <Press Release - NLRB Administrative Law Judges Validly Appointed.pdf>
> <Press Release - NLRB to Undertake Comprehensive Internal Ethics and Recusal Review.pdf>

From: (b) (6)
To: Rothschild, Roxanne L.; (b) (6) @levyratner.com)
Cc: Ring, John; McFerran, Lauren; Kaplan, Marvin E.; Emanuel, William
Subject: RE: ABA Conference - Board panel session
Date: Thursday, October 25, 2018 1:59:58 PM

Thanks, (b) (6) and I will put our heads together to come up with softball questions to introduce the topics. We will share them with everyone well in advance of San Francisco for review/comment. Meeting before our presentation sounds great.

Have a great day and thanks again.

(b) (6)

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Faegre Baker Daniels LLP
300 N. Meridian Street | Suite 2700 | Indianapolis, IN 46204, USA

From: Rothschild, Roxanne L. <Roxanne.Rothschild@nlrb.gov>
Sent: Thursday, October 25, 2018 11:58 AM
To: (b) (6) @levyratner.com) (b) (6) @levyratner.com>; (b) (6) (b) (6) @FaegreBD.com>
Cc: Ring, John <John.Ring@nlrb.gov>; McFerran, Lauren <Lauren.McFerran@nlrb.gov>; Kaplan, Marvin E. <Marvin.Kaplan@nlrb.gov>; Emanuel, William <William.Emanuel@nlrb.gov>
Subject: ABA Conference - Board panel session

(b) (6) :

FYI – the Chairman and the Board Members have divvied up the topics that were discussed for the ABA conference. We will be meeting with our Agency Ethics Officer next week to go over the topics as well as speaking engagement "do's & don'ts" for the conference. The Chairman thought it made sense to just have a quick meeting in San Francisco with both of you prior to the panel presentation to let you know who would be covering which topics during the session. They also plan to prioritize the order of the topics listed below in case time does not allow for all of the topics to be covered. Just so you know, they have asked me to speak on the subject of the Board's enhanced ADR pilot program because that program is run by my office. I'm not sure where the ADR program will end up in the list of priorities.

Please let me know if this works for you.

At this point, the topic assignments are as follows. Please note that this list does not yet represent the priority order.

1. Joint Employer Rulemaking - Chairman Ring
2. *Caesars/Rio All-Suites* Notice & Invitation to File Briefs to address the standard set forth in *Purple Communications* re: employees' nonwork-related use of employer email systems - Member Kaplan
3. *Loshaw* Notice & Invitation to File Briefs to address 8(f)/9(a) collective bargaining relationships in the construction industry (plus possibly the pending motion to dismiss the charge) - Chairman Ring
4. Boeing – Member Kaplan
5. Murphy Oil - Member Emanuel
6. ALJ Appointments (Board's decision in *WestRock Services*, 10-CA-195617 finding that the NLRB ALJ's are validly appointed) – Member McFerran
7. Internal Ethics and Recusal Review - Chairman Ring first, then Member Emanuel
8. Board's ADR program – Roxanne Rothschild
9. Election rules RFI/rulemaking status - Member Emanuel

Thank you,

Roxanne Rothschild
Acting Executive Secretary
National Labor Relations Board
1015 Half Street SE, Office 5010, Washington, DC 20570
roxanne.rothschild@nlrb.gov | 202-273-2917

From: (b) (6)
Subject: FYI
Date: Wednesday, July 24, 2019 3:21:59 PM
Attachments: GRK Testimony.pdf

See attached.

(b) (6)
HR Policy Association
1100 13th St, NW, Suite 850 | Washington, DC 20005
Direct: (b) (6) | Cell: (b) (6) @hrpolicy.org
Assistant: (b) (6) | (b) (6) (b) (6) @hrpolicy.org

COALITION FOR A
DEMOCRATIC WORKPLACE

Testimony of

G. Roger King*
Senior Labor and Employment Counsel
HR POLICY ASSOCIATION
on behalf of the COALITION FOR A DEMOCRATIC WORKPLACE

For the

House Education and Labor Committee
Subcommittee on Health, Employment, Labor, and Pensions

Hearing on

Protecting the Right to Organize Act: Modernizing America's Labor Laws

July 25, 2019

*Mr. King acknowledges the assistance of his colleague Gregory Hoff at the HR Policy Association in preparing this testimony.

Introduction and Statement of Interest

Chairperson Wilson, Ranking Member Walberg, and distinguished members of the Subcommittee:

Thank you for this opportunity to again appear before the Committee. I am the Senior Labor and Employment Counsel at HR Policy Association, and I am testifying here today on behalf of the Coalition for a Democratic Workplace ("CDW"), a broad-based coalition of employers and associations who have a continuing active interest in our nation's labor laws, and of which HR Policy Association is a member. My biographical information is attached to my written testimony. I request that my written testimony and the exhibits thereto, in their entirety, be entered into the record of this hearing.

The Coalition for a Democratic Workplace is a broad-based coalition of hundreds of organizations representing hundreds of thousands of employers and millions of employees in various industries across the country concerned with a long- standing effort by some in the labor movement to make radical changes to the National Labor Relations Act without regard to the severely negative impact they would have on employees, employers and the economy. CDW was originally formed in 2005 in opposition to the so-called Employee Free Choice Act (EFCA) – a bill similar to the PRO Act – that would have stripped employees of the right to secret ballots in union representation elections and allowed arbitrators to set contract terms regardless of the consequence to workers or businesses.

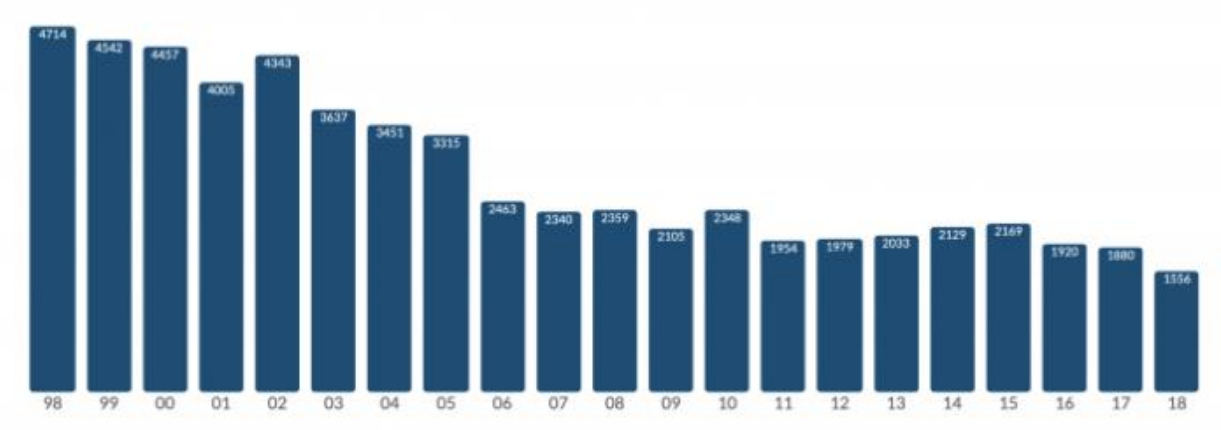
The HR Policy Association is a public policy advocacy organization representing chief human resource officers of major employers. Recently, the HR Policy Association published *Workplace 2020: Making the Workplace Work*, a report representing the general views and experiences of the Association's membership on the trends shaping the workforce, the outdated policies that govern it, and the way forward.

Summary of Opposition to H.R. 2474

The Protecting the Right to Organize Act of 2019, H.R. 2474 is an unprecedented attempt to radically change our nation's labor laws to assist labor organizations without any regard to any negative impact the provisions of the bill would have on workers, consumers, employers, and the American economy. Such provisions include (1) amendments to the National Labor Relations Act ("NLRA" or "the Act") to change the definition of joint employer status under the NLRA – a position directly opposite the bipartisan position the House of Representatives took in passing the Save Local Business Act, passed in November of 2017; (2) an expansive definition of employee status under the NLRA that blindly follows a controversial California court decision which substantially narrowed the definition of independent contractor status (the California "ABC" test); (3) authorization for unions to obtain personal employee information including employee personal cell phone numbers and personal email addresses, among other information; (4) a complete undermining of the secondary boycott laws that protect neutral employers and employees – especially small and medium-sized business entities – from being brought into labor disputes of

other parties; (5) a government-mandated procedure for third party arbitrators to dictate employment terms in first negotiations, and eliminate an opportunity for employees to vote on ratification; and (6) a resurrection of the "card check" process whereby employees can be forced into union representation without having the benefit of a secret ballot vote. H.R. 2474 would also overrule three Supreme Court decisions,[1] and make extreme changes to the procedures of the National Labor Relations Board ("NLRB" or "Board"). H.R. 2474 upsets in many important areas the delicate balance in our labor laws between employers and labor interests – indeed, many of the laws amended by this legislative proposal have been in effect for decades, including numerous state right-to-work laws, and have not been altered in the manner suggested in this legislation by either Democrat or Republican controlled congresses.

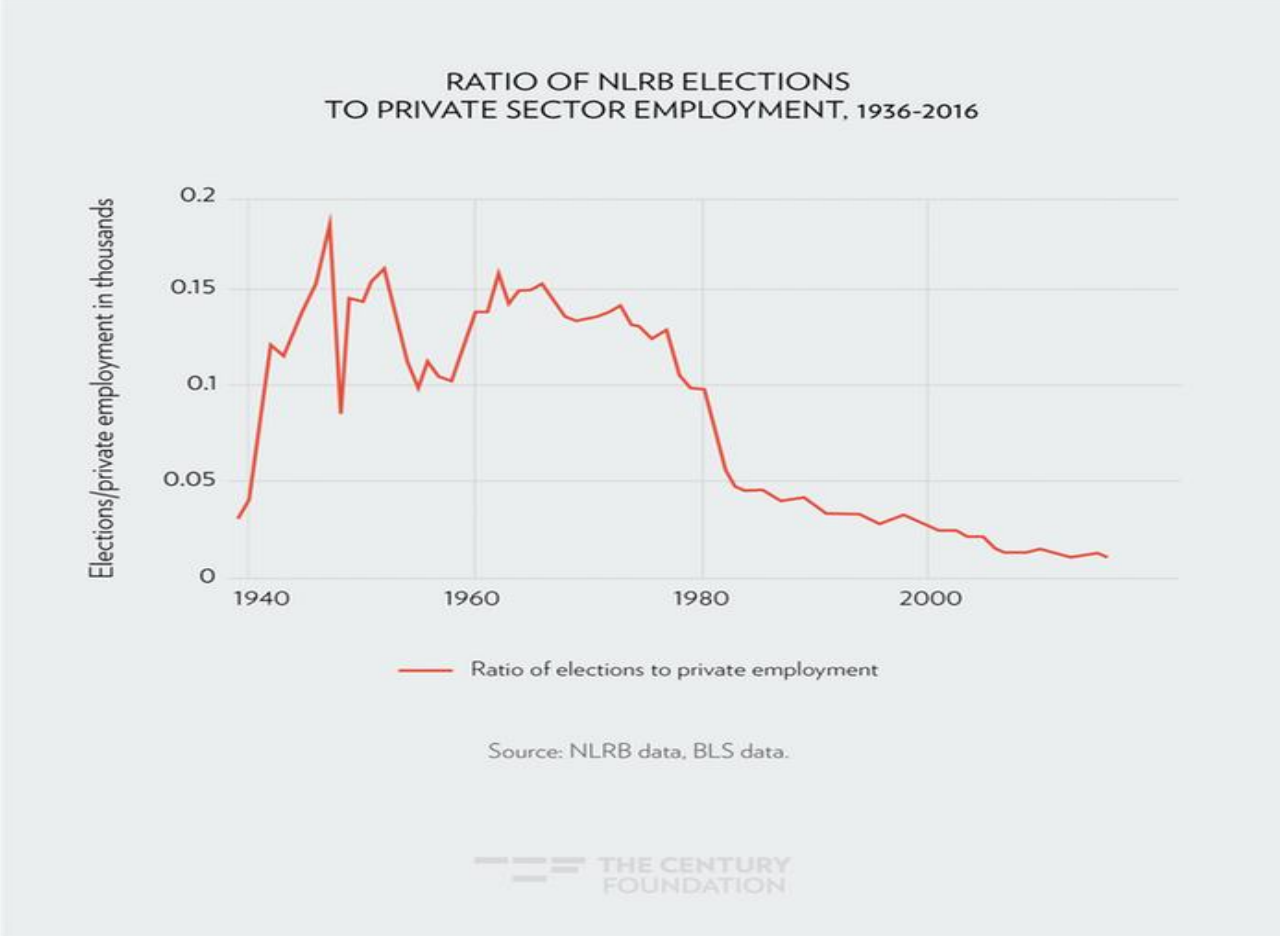
Finally, the underlying premise of this comprehensive labor organization wish list is the incorrect assumption that our labor laws are broken and severely disadvantage union interests. The NLRB and the NLRA are not broken – the Board is one of the most efficient and productive agencies in the federal government and the NLRA has greatly contributed to the maintenance of labor-management stability in this country for decades. Labor organizations have simply not devoted the necessary resources to organizing activity and have not adapted to a changing workplace. As the charts below clearly show, union organizing and the number of petitions filed by unions with the National Labor Relations Board have fallen nearly 63% from 5,000 in 1997 to 1,854 in 2017.



Source: Labor Relations Institute

In FY 2018, the number of petitions filed dropped even further to 1,597, the fewest number in over 75 years.[2] Perhaps most telling, as the rate of private sector employment has increased, the number of NLRB elections has decreased precipitously.

[1] *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018); *Hoffman Plastic Compounds, Inc., v. NRLB*, 533 U.S. 137 (2002); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).
[2] *See also* Exhibit 1, which shows similar data from the National Labor Relations Board.



Further, when examining data from the U.S. Department of Labor Bureau of Labor Statistics, the lack of union attention to union organizing is even more evident. In FY 2018, there were 95.8 million potential private sector employees available for organizing in the country under the National Labor Relations Act.[3] The number of employees petitioned-for, in that same year, according to NLRB statistics, was only 73,109.[4] Accordingly, unions only sought to represent .076% of potential new members in this country. An examination of data from other years also establishes the same exceedingly low union organizing rate.

This lack of attention by the union movement to traditional organizing also was recently outlined in an article entitled "AFL-CIO Budget is a Stark Illustration of the Decline of Organizing"[5] According to this article, the AFL-CIO's internal budget for 2018-2019 dedicates less than one-tenth of its budget to organizing – down from nearly 30% a decade ago. This article states "the percentage of the budget dedicated to all organizing activities is about the same as the

[3] *Union Membership Annual News Release*, BUREAU OF LABOR STATISTICS (Jan. 18, 2019), https://www.bls.gov/news.release/archives/union2_01182019.htm.
[4] *Election Reports – FY 2018*, NLRB, https://www nlrb.gov/reports/nlrb-performance-reports/election-reports/election-reports-fy-2018.
[5] Hamilton Nolan, *AFL-CIO Budget is a Stark Illustration of the Decline of Organizing*, SPLINTER (May 16, 2019), https://splinternews.com/afl-cio-budget-is-a-stark-illustration-of-the-decline-o-1834793722.

portion dedicated to funding the Offices of the President, Secretary-Treasurer, Executive Vice President, and associated committees [under the AFL-CIO] the largest portion of the budget – more than 35% – is dedicated to funding political activities." The statistics are clear. Unions have, for whatever reason, lost their desire and commitment to organize workers and they are increasingly relying on Congress to relieve them of the burdens of organizing with proposals such as the PRO Act that we are discussing today. Further, the labor movement is increasingly relying upon assistance from pro-union regulations promulgated by the regulatory agencies and decisions of the NLRB.[6]

Labor law leaders themselves have acknowledged the failure of the union movement to commit sufficient resources and attention to organizing. For example, the late Hector Figueroa, the influential former leader of SEIU Local 32BJ, in an op-ed published in the New York Times earlier this month, argued that "you will find that with only a few exceptions, most unions are not committing significant resources to organizing nonunion workers."[7] Figueroa further noted:

> For too long, too many unions have avoided the tough work that needs to be done to organize nonunion workers, to convince our own members that it's in their interest to expand our ranks, and to retool our organizations by putting resources into building power. We have let ourselves be backed into a corner, by trying to just hold on to what we have and fighting only for workers who are already union members."[8]

Labor advocates have further taken union leadership to task for failing to adapt and incorporate new technologies and social media opportunities into their organizing efforts. In particular, Mark Zuckerman, former Deputy Director of the Domestic Policy Council in the Obama White House and President of the Century Foundation, observed:

> It is surprising that one of the most successful and powerful social movements in the nation's history – the labor movement – has not launched a coherent, large-scale digital organizing strategy to recruit a new generation of workers.[9]

---

[6]Notwithstanding the Obama Board's substantial change in labor policy in favor of unions, and the Obama Board's adoption of expedited or ambush election rules, union density still has declined. *See*, *e.g.*, Michael J. Lotito et al., *Was the Obama NLRB the Most Partisan Board in History?*, WORKPLACE POL'Y INST. (Dec. 6, 2016), https://www.littler.com/publication-press/press/was-obama-nlrb-most-partisan-board-history (noting that the Obama Board overturned nearly 4,600 years of established law).

[7] Hector Figueroa, "The Labor Movement Can Rise Again" N.Y. TIMES (Jul. 12, 2019), https://www.nytimes.com/2019/07/12/opinion/hector-figueroa.html.

[8] *Id*.

[9] Mark Zuckerman, *Finding Workers Where They Are: A New Business Model to Rebuild the Labor Movement*, THE CENTURY FOUNDATION (Feb. 6, 2019), https://tcf.org/content/report/finding-workers-new-business-model-rebuild-labor-movement/?agreed=1. *See also,* "Unions aren't exactly early adopters, and many still haven't embraced digital" Jack Milroy, *Why Unions Need a Digital Strategy*, MEDIUM (Apr. 29, 2016), https://medium.com/@jack_milroy/the-list-makes-us-strong-why-unions-need-a-digital-strategy-42291213298a; "It is heartbreaking to witness our movement risk near-irrelevance when workers are ready to take action" Figueroa, supra note 5.

Congress should not be misled regarding the reasons for the decline in union membership. Further, Congress should not respond to requests to continually rescue the labor movement from its own shortcomings. H.R. 2474, unfortunately, is a prime example of exactly this type of rescue attempt. H.R. 2474 is an unprecedented attempt to radically change our nation's labor laws in a manner harmful not only to employers and employees but also ultimately to the nation's economy. CDW, and its hundreds of members, including the HR Policy Association, strongly oppose its enactment.[10]

Specific Objections to H.R. 2474

- **Section 2 – The Policy Statements**

This Section of the PRO Act is largely political policy rhetoric and contains inaccurate statements in a number of areas, including the statement on page 4 that "employers routinely fire workers for trying to form a union at their workplace" and the statement at page 4 that "many employers maintain policies that restrict the ability of workers to discuss workplace issues with each other directly contravening [NLRA]… rights." These activities are unlawful, and the Board provides mechanisms for addressing these problems. Statements at page 6 of the bill are also incorrect that state that Congress disapproves of the right of employers to permanently replace economic strikers; and that "…employers have abused the representation process of the NLRB to impede workers from freely choosing their own representatives and exercising their rights under the Act."

- **Section 4 – Establishment of a New Joint Employer Standard**

This Section of H.R. 2474 adopts the widely criticized standard established in *Browning-Ferris Indus.*, 362 NLRB No. 186 (2015) to determine joint employer status under the NLRA.[11] Indeed, this provision is directly opposite of the bipartisan position the House of Representation took on this issue in a floor vote on the Save Local Business Act in November of 2017. Further, this provision of the legislation arguably goes even beyond the holding in the *Browning-Ferris* case, by stating that joint employer status can be established under the NLRA based solely on "indirect or reserved control." This proposal inappropriately expands the definition of joint employer status, which would result in unnecessary protracted litigation and potential liability for many business entities. This legislative proposal has the potential to destroy the franchisor and franchisee model that has led to the creation of millions of jobs in this country and the development of hundreds of thousands of successful small business entities.[12] CDW does, however, support the initiatives

[10] CDW fully endorses the previous opposition testimony presented by attorney Philip Miscimarra of the Morgan Lewis law firm, who also previously served as both a member and chairman of the National Labor Relations Board.
[11] *Browning-Ferris Indus.*, 352 NLRB No. 186 (2015)
[12] For a comprehensive analysis detailing the negative economic consequences of an overly expansive joint employer standard, *see* International Franchise Association, Comment Letter on Proposed Rule on the Standard for Determining Joint Employer Status (Jan. 28, 2019); *see also* Brief of Amicus Curiae The International Franchise Association in Support of Defendant, *Roman et al. v. Jan-Pro Franchising Int'l, Inc.*, No. 3:16-cv-05961 (9th Cir. 2019).

currently being undertaken by the NLRB to better define when a joint employer status is established under the NLRA. CDW also supports the notice of proposed rulemaking initiative being undertaken by the United States Department of Labor to clarify when joint employer status is established under the Fair Labor Standards Act.

- **Section 4 – Definition of Employee Status**

This Section of the legislation essentially adopts the "ABC" test developed by the California Supreme Court.[13] If adopted, it would invalidate decades of legal precedent regarding the definition of independent contractor status and make it far more difficult for workers to establish independent status, evidenced by California's struggle to codify the standard into law without creating multiple carve outs. The fact that an individual performs a service for a business that is within the scope of the services customarily provided by such entity should not – and has not – automatically make such an individual an employee of the entity in question. This proposal clearly is directed at the evolving nature of the type of work that many individuals do on an independent basis in the evolving "gig" economy, and would have a devastating impact on such workers. The issue of when an individual is an employee or an independent contractor should be addressed in separate legislation, and then only after a thorough study of the many complex issues associated with this area. The blind approach taken in H.R. 2474 to this issue should be clearly rejected.

- **Section 4 – Alteration of the Definition of a Supervisor Under the NLRA**

While CDW agrees that it would be helpful to clarify the definition of supervisory status under the NLRA, the approach being taken in H.R. 2474 is clearly a one-sided and biased approach to make more individuals employees under the Act and therefore, become eligible for union representation. There is no factual or legal basis to support the proposed amendments to Section 2(11) of the NLRA contained in this bill. It is critical that employers have the ability to rely upon the requisite number of supervisors and managers to run their business. Finally, this proposal would unnecessarily, and improperly overrule decades of NLRB case law established under both Democrat and Republican Boards regarding the definition of supervisory status under the NLRA.

- **Section 4 – Establish Authority for the National Labor Relations Act to Engage in Economic Analysis**

While credible arguments can be made that the NLRB should be provided with the authority to engage in certain economic analysis, particularly in the rulemaking area, more study and thought should be given to when and how the Board should engage in this type of analysis. The simple one-line provision in H.R. 2474 that would provide authority for the Board to engage in economic analysis is not the correct way to proceed on this issue.

[13] *Dynamex Operations W. v. Superior Court*, 232 Cal.Rptr.3d 1 (2018).

- **Section 4 – Prohibition on Employer Hiring Permanent Replacements in Economic Strike Situations**

The PRO Act, as stated above, erroneously stated in its preamble that Congress has previously concluded that employers are prohibited from hiring permanent replacements in economic strike situations. This provision of H.R. 2474 is yet another example of the one-sided and incorrect approach taken in this legislation. The case law, including U.S. Supreme Court decisions, clearly permits employers to continue their operations during economic strikes by hiring replacement workers.[14] The right of unions to strike and the right of employers to hire permanent replacements is an important balance of interests under our Nation's labor laws and permits both unions and employers to engage in "economic warfare" if disputes cannot otherwise be resolved. While the CDW believes that the option for employers to use permanent replacements should only be carefully and thoughtfully utilized, such right nonetheless needs to be maintained as it is critical to achieve the necessary balance of interests when strikes occur.

- **Section 4 – Employer Presentations to Employees**

H.R. 2474 makes it an unfair labor practice for an employer to hold mandatory employee meetings in the workplace in union campaign settings ("i.e., so-called captive audience speeches"). To our knowledge, there is no evidence to support the conclusion that employers can unduly influence employees to oppose unionization in such meetings. Further, an employer is considerably restricted in what it can say in such meetings. For example, election objections can be successfully pursued by a union or unfair labor practices charges could be successfully filed against an employer if, in such meetings, the employer threatens employees who support unionization, or the employer promises better benefits to employees if they oppose unionization. Further, the faulty premise that such meetings seriously impede a union's ability to win an election is specious at best, particularly due to the ability of employees to communicate through social media with unions and also among themselves using a wide array of options. Indeed, an employee's ability today to go online to obtain facts and information about the issues of union representation is greater than ever. In summary, these meetings have virtually no bearing on the success or lack thereof of the union movement and should not be made unlawful. Finally, it needs to be noted that unions, unlike employers, have the right to visit employees at their homes and engage in campaign activity in such settings.

- **Section 4 – Government Controlled Collective Bargaining – Arbitrator Imposed Terms (Interest Arbitration) in Initial Bargaining Situations**

H.R. 2474 establishes for the first time in the NLRA, government control of collective bargaining. In negotiations, the legislation establishes minimum time frames for parties to negotiate. If an agreement cannot be reached within such timeframe, panels of arbitrators are mandated to impose employment terms on the parties. This is an exceedingly poor policy decision

[14] *Hoffman Plastic Compounds, Inc., v. NRLB*, 533 U.S. 137 (2002).

by the drafters of the PRO Act. Third party arbitrators may know virtually nothing about the employer's business and have no economic interest or stake in the future of the business entity in question. The ultimate terms that such arbitrators impose upon the parties may lead to the closure of the business entity and the loss of jobs of its employees.

- **Section 4 – Restriction on Employer Prohibitions on Employee Class or Collective Action Filings**

This provision would invalidate the U.S. Supreme Court's decision in *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018), which held that employers can place restrictions on employees' class or collective action filings.[15] The approach of this legislation ignores the sound reasoning of the Supreme Court's majority in *Epic Systems* and also undermines substantial legal precedent regarding the Federal Arbitration Act that encourages nonjudicial resolution of workplace disputes. Class and collective action litigation have literally "spun out of control" in the last decade, and legitimate attempts by employers to resolve workplace disputes through alternative procedures other than protracted, expensive class and collective action litigation should be encouraged by the Committee, not discouraged.

- **Section 4 – NLRB Election Rules – Requirement that Employees Furnish Personal, Private Information to Petitioning Unions**

This subsection of H.R. 2474 is a substantial invasion of the privacy rights of employees. The legislation would require employers to provide to petitioning unions their employees' "personal landline and mobile telephone numbers and work and personal email addresses," along with other information, if the employee is in a voting unit being proposed by the petitioning union. The legislation does not permit the employee to opt-out of providing this personal information and provides absolutely no protection that such personal information would be kept confidential and not shared with others.

- **Section 4 – Prohibition on Employer Party Status in NLRB Representation Proceedings**

This subsection is a substantial violation of employer due process rights as employers have compelling interests to protect in such proceedings, including the important interest as to which job classifications are to be included in a voting unit. Further, employers have critical interests in which employees are to be classified as supervisors, managers, and confidential employees as such individuals are vitally important for an employer to successfully operate its business. Finally, employers have substantial interests in the procedure to be utilized in any NLRB conducted election as employers must necessarily protect against inappropriate interference with their operations during an NLRB election. There is no evidence to support the need to prohibit an employer from being a party to an NLRB election proceeding. To completely eviscerate an

[15] *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018).

employer's party status in representation election proceedings is not only a violation of employer's due process rights, but will result in a completely unworkable NLRB election procedure.

- **Section 4 – Imposition of Bargaining Orders Through Card Checks**

This subsection of the legislation brings back "card checks" and memories of the failed Employee Free Choice Act that was strongly supported by organized labor. Under the new iteration, virtually any type of proven irregularities in an NLRB election that a union loses would result in a bargaining order if, in the year proceeding the election, the petitioning union had obtained signatures on authorization cards for a majority of the employees in the voting unit. There is no compelling evidence whatsoever to support such a radical change in federal labor law. Indeed, this approach is simply a "backdoor card check" approach to determine union representational status. *Gissel* bargaining orders[16] are available today to unions if they can establish that employers have committed numerous and severe unfair labor practices or objectionable conduct during the critical pre-election period. Finally, a very small percentage of unfair labor practice cases ever reach the Board or courts for decision. In FY 2018, nearly 80% of unfair labor practice charges were either resolved by way of settlement, at the regional board level, or at the administrative law judge stage, or withdrawn, with Board Orders comprising only 2% of the disposition of such charges.[17] Stated alternatively, representatives of organized labor have continually, incorrectly overstated both the number of cases where severe election misconduct occurs and misrepresented the type of alleged employer conduct that is at issue in such cases.

- **Section 4 – NLRB Election Rules and Timelines**

The PRO Act codifies certain Obama NLRB era election timelines (also known as "ambush" or "quickie" election regulations). These timelines were very controversial at the time they were adopted and are being reviewed by the Board at present. Any change in Board election procedures should be done by examining all aspects of the election process.

- **Section 4 – Making Decisions of the NLRB Self-enforcing**

The PRO Act changes the current procedure of how Board decisions are enforced by making such decisions effective upon their issuance. The current procedure is that the Board must seek enforcement of its orders in the courts. If the procedure in this area is going to change, other NLRA procedural changes also should be addressed, including a change that would permit employers to directly appeal NLRB decisions in representation cases to the courts without having to first go through the internal Board process of being charged with a technical Section 8(a)(5) violation of failure to bargain in good faith. This current elongated prerequisite for employers to appeal representation decisions is not an appropriate use of resources for any party, including the Board and unions, and results in unnecessary delays in resolving the issues in question.

[16] *See NLRB v. Gissel Packing Co.*, 89 S.Ct. 1918 (1969).
[17] *Disposition of Unfair Labor Practice Charges in FY18*, NLRB, https://www nlrb.gov/news-outreach/graphs-data/charges-and-complaints/disposition-unfair-labor-practice-charges.

- **Section 4 – Establishment of NLRB Civil Fine Remedies and Increased NLRB Injunction Authority**

H.R. 2474 contains numerous subsections that establish civil fines for employer violations of the NLRA and permits NLRB representatives to obtain expedited injunctive relief in federal district courts. There are numerous problems with this approach. First, in the 84-year history of the NLRA and its predecessor, there has never been a procedure that imposed fines and penalties on parties to Board proceedings. If the NLRA is to be restructured in this way, rogue unions that violate the NLRA should also be subject to the same type of civil fines and injunctive procedures. The PRO Act, in its one-sided approach, ignores union misconduct altogether and excludes labor organizations from any type of civil fines and expedited injunctive relief. More fundamentally, this legislative approach is based on the false premise that there are a large number of NLRA violations that merit this type of remedy. As noted above, very few unfair labor practice cases ever reach the Board level and the courts for resolution. Of the cases that do require full NLRB and judicial attention, a very small number involve serious and repeated alleged violations of the Act. Cases that do reach the Board and court level often involve policy issues and close call factual situations as to whether the NLRA has been violated. Civil fines simply are not necessary as a remedy to such a small percentage of cases. In any event, if civil fines are to be included in the NLRA, both rogue employer and rogue unions should be equally subject to such sanctions.

- **Section 4 – Directors and Officers Liability for NLRA Violations**

This subsection of H.R. 2474 extends potential civil penalties to directors and officers of an employer "based on the particular facts and circumstance presented" and "civil liability could be …assessed against any director or officer of the employer who directed or committed the violation, had established a policy that led to such violation, or had actual or constructive knowledge of and the authority to prevent the violation and failed to prevent the violation." Again, our nation's labor laws have never been written as civil penalties statutes, and there is no basis to begin to proceed in that direction at present, particularly when there are exceedingly few instances to compel such a remedy. Additionally, there is great ambiguity on how and when such liability might be assessed. Civil fines in this area and other areas discussed above are also a particular concern given the ever-increasing "policy oscillation" by Boards under different administrations. Stated alternatively, given the frequently changing direction of the Board in important labor policy areas, it would be exceedingly unfair to employer officers and directors to be assessed liability based on unknown changes in the law. Finally, even if the NLRA were to be so amended, as noted above, union officers and officials also should be included in such civil liability.

- **Section 4 – Assessment of Attorneys' Fees and Punitive Damages**

This legislation would also provide for the potential recovery by employees and unions of their attorneys fees and provide for the potential of punitive damages for violation of the NLRA. Again, the legislation does not provide that unions who also violate the NLRA would have any such legal exposure. In any event, for reasons stated above, these non-traditional remedies are not appropriate

to be included in the NLRA, and there has been no case made that the NLRA should be amended to include them.

- **Section 4 – Approval of Intermittent Work Stoppage**

H.R. 2474 would permit unions and employees acting in concert to engage in frequent work stoppages and strikes. This unprecedented permission to engage in protected activity presumably would also include worker slowdowns, "work to rule" employee actions, frequent filing of 10-day strike notices directed against healthcare employers under Section 8(g) of the NLRA, and other union tactics intended to disrupt an employer's operations. There is no objective rationale to support this radical change of our labor laws. Indeed, this provision is especially harmful to employers when it is coupled with an earlier proposal in the PRO Act to prohibit employers from permanently replacing economic strikers.

- **Section 4 – Fair Share Agreements Permitted**

This provision of the PRO Act would invalidate state right-to-work laws and permit unions to negotiate agreements with employers that require bargaining unit employees to either become a member of the union or make a financial contribution to the union for representation expenses (i.e., become a "fee payer") as a condition of continued employment. This subsection would overturn 26 state laws that currently prohibit such clauses in collective bargaining agreements. This part of the NLRA should not be changed. States should continue to determine their position on this issue without interference from the federal government.

- **Section 4 – Right of an Employee to File a Private Right of Action in Federal District Court for Alleged Violations of the NLRA**

The PRO Act for the first time in the history of the NLRA would provide employees with a private right of action to pursue claims of unfair labor practices in federal district court if the NLRB failed to proceed with the individual's charge within 60 days. While the CDW agrees that the NLRB should expeditiously process cases at the Board level, the solution to this issue is not the creation of a new private right of action. This approach will likely flood already overworked federal district courts and unnecessarily clog their dockets. Although there may be a certain appeal to creating a "labor court" system in the country, our federal district courts at present do not have expertise in this area of the law. Additionally, having a dual track for employees to pursue a private right of action while concurrently having the NLRB proceed in addressing the same case could unnecessarily complicate the resolution of unfair labor practice charges. Again, as stated a number of times previously, the Board has an excellent track record in expeditiously resolving a high percentage of its cases at the regional and administrative law judge level, and there is no need, therefore, for a private right of action. Finally, the NLRB at present is reviewing how it processes cases at the Board level and is exploring procedures to expedite its decisional cases processing. The Board should be permitted to complete its important work in this area without legislative interference.

- **Section 6 – Reinstatement of the Persuader Rule and Expanded Consultant Reporting**

H.R. 2474 also includes a reinstatement of the Obama era Department of Labor expanded reporting requirement rule for entities that provide assistance for employers and entities in union campaign situations. This rule was revoked by the present Administration on July 18, 2018. The Committee has not developed any record to support this proposed change in the law. Indeed, there are already in place substantial reporting requirements for employers and entities that provide financial assistance to employers in campaign situations. Finally, if the Committee is going to pursue this area, it should review the activities of worker centers, employee committees, and like organizations to determine whether they should also be required to report their activities to the United States Department of Labor on the same basis as traditional labor unions.

- **Section 5 – Removal of Secondary Boycott Restrictions on Unions**

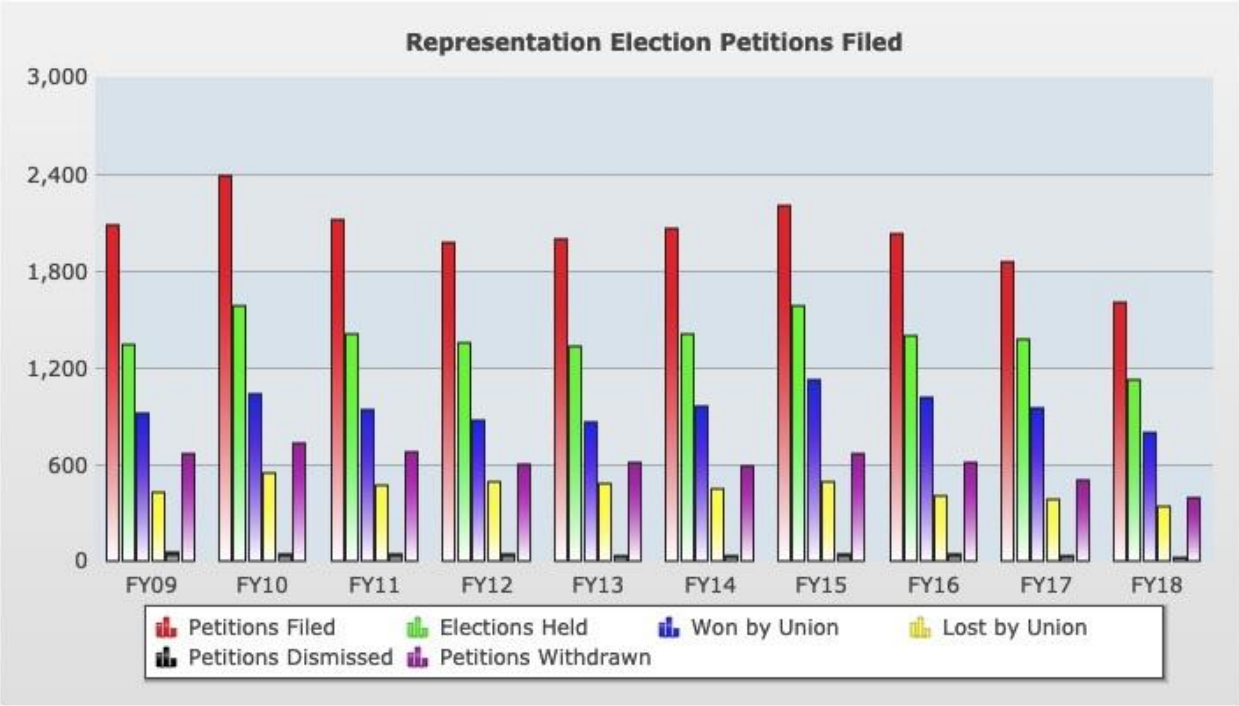
The PRO Act, in one of its most radical proposals, removes the ability of employers to obtain relief in court for illegal secondary boycott activities of unions. Secondary boycott protection for business entities, including in particular smaller entities that can be subject to boycott pressure and coercion, is often essential for their survival. Removal of such a deterrent from our nation's labor laws should not occur. Indeed, employers at present already face substantial obstacles in prohibiting illegal secondary activity.[18] The PRO Act takes absolutely the wrong approach in this area – restrictions against secondary boycott activities should be strengthened and neutral employers and employees should not be subject to such coercive activities. Indeed, the very survival of some business entities depends on the appropriate enforcement of laws in this area.

Conclusion

H.R. 2474 is a "wish list" serving only the interests of labor organizations that represent at most approximately 6% of the nation's private sector workforce. The argument that the lack of success of the union movement can be attributed to our nation's labor laws is not correct. Unions, to their detriment, have devoted increasingly smaller portions of their resources to union organizing, but yet are increasing the amount of resources devoted to political activity. Their apparent "gameplan" is to have Congress and federal regulatory agencies assist them in increasing union density in the country without regard to the impact on employees, consumers, and others. Our nation's labor laws are not broken, and Congress should not make radical changes as suggested in H.R. 2474. The numerous proposals in this legislation are not well thought out, are not supported by record evidence, and are unnecessarily biased against employers and employees. CDW, therefore, opposes the enactment the legislation.

[18] *See, e.g.*, *Wartman v. UFCW*, 871 F.3d 638 (4th Cir. 2017); *Int'l Union of Operating Engineers* et al., 2019 WL 3073999 (N.L.R.B. Div. of Judges) (Jul. 15, 2019); *Laborers' Int'l Union of North America* et al. 2015 WL 5000792 (N.L.R.B. Div. of Judges) (Aug. 21, 2015).

EXHIBIT 1[19]



	Petitions Filed	Elections Held	Won by Union	Lost by Union	Petitions Dismissed	Petitions Withdrawn
FY09	2082	1335	915	420	46	657
FY10	2380	1571	1036	535	37	725
FY11	2108	1398	935	463	43	667
FY12	1974	1348	868	480	38	597
FY13	1986	1330	852	478	27	607
FY14	2053	1407	952	440	24	586
FY15	2198	1574	1120	480	39	663
FY16	2029	1396	1014	401	38	610
FY17	1854	1366	940	375	29	493
FY18	1597	1120	790	330	17	386

[19] *Representation Petitions,* NLRB, https://www nlrb.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc.

From: Emanuel, William
To: (b) (6)
Subject: RE: OSBA NLRB Seminar
Date: Wednesday, November 13, 2019 10:15:00 AM

Thanks (b) (6) I will review this for the speech.

From: (b) (6) @hrpolicy.org> **On Behalf Of** (b) (6)
Sent: Wednesday, November 13, 2019 9:31 AM
To: Emanuel, William <William.Emanuel@nlrb.gov>
Subject: OSBA NLRB Seminar

Attached is an NLRB Update for the OSBA Seminar.

Thanks,

(b) (6)
HR Policy Association
NEW ADDRESS
1001 19th Street North, Suite 1002| Arlington, VA 22209
Direct: (b) (6) | Cell: (b) (6) (b) @hrpolicy.org
Assistant: (b) (6) @hrpolicy.org

From: (b) (6)
Subject: The NLRB: The Times They are A-Changing--Again - 2019 NLRB Update - December 3 Dinner Invitation!
Date: Thursday, November 14, 2019 4:17:08 PM
Attachments: image001.png
19-108.pdf
Importance: High

Good afternoon,

On behalf of the NLRB seminar planning committee, thank you for agreeing to speak for the December 4 NLRB Update seminar. A copy of the brochure is attached.

The OSBA Labor and Employment Law Section and the NLRB Seminar planning committee would like to invite you to dinner on Tuesday evening, December 3 at The Avenue Grandview Steak Tavern, 1307 Grandview Avenue, in Grandview. (If you requested overnight accommodations, the restaurant is in close proximity to the Hyatt Place Grandview/OSU.) The reservation is for 6:30.

Please respond to this email to RSVP for the 6:30 dinner on Tuesday evening, December 3.

Just a reminder that any course materials for inclusion in the course book are due no later than **Monday, November 25**. If you have any questions about materials, please don't hesitate to ask.

If you requested a hotel reservation and did not receive a confirmation of same, please let me know so I can check with our meetings manager. If you need a hotel reservation and have not yet requested one, please contact me so we can check on room availability.

Again, thank you for speaking, and we hope you are able to join the seminar planning committee and fellow speakers for dinner on December 3!

(b) (6)

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The NLRB: The Times They Are A-Changing—Again
2019 NLRB Update

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Columbus
Ohio State Bar Association, 1700 Lake Shore Dr., 43204

Fairfield
Receptions Conference Center North, 5975 Boymel Dr., 45014

Perrysburg
Hilton Garden Inn, 6165 Levis Commons Blvd., 43551

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2019 NLRB Update

CLE19-108
Code: 1219

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James G. Burkhardt, Esq.; Toledo

Marilyn L. Widman, Esq.; Widman & Franklin LLC; Toledo

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Iva Y. Choe, Esq.; Regional Attorney, National Labor Relations Board, Region 8; Cleveland

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George S. Crisci, Esq.; Zashin & Rich Co., LPA; Cleveland

Bruce B. Elfvin, Esq.; Elfvin, Klinshirn, Royer & Torch LLC; Cleveland

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William A. Nolan, Esq.; Barnes & Thornburgh, LLP; Columbus

Thomas M. Seger, Esq.; Baker Hostetler; Cleveland

Thomas J. Wiencek, Esq.; Mercy Health; Akron

Alan L. Zmija, Esq.; Seven Hills

PROGRAM AGENDA

8:00 **Registration/Continental Breakfast**

8:25 **Introduction/Welcome/Opening Remarks**
John S. Marshall, Esq.; Marshall and Forman, LLC; Columbus
Chair, Ohio State Bar Association Labor and Employment Law Section

8:30 **Updates from National Labor Relations Board Regions 8 and 9**
Patricia Nachand, Regional Director, Region 25, National Labor Relations Board; Indianapolis, Indiana and Interim Director, Region 9; Cincinnati
Iva Y. Choe, Esq.; Regional Attorney, Region 8, National Labor Relations Board; Cleveland

9:00 **A View from the Board**
William Emanuel, Esq.; Member, National Labor Relations Board; Washington DC
Facilitator: G. Roger King, Esq.; HR Policy Association; Washington DC

10:15 **Break**

10:30 **Am I an Employee, and if I Am, Who's My Employer?**
The continuing evolution of independent contractor/joint employer definitions
Region 8: Gregory Gleine, Esq.; Supervisory Attorney, National Labor Relations Board; Cleveland
Union: Timothy J. Gallagher, Esq.; Schwarzwald McNair & Fusco LLP; Cleveland
Management: William A. Nolan, Esq.; Barnes & Thornburg LLP; Columbus

11:15 **Deflating the Rat and the Fat Cat: Are they Protected as Speech or Unprotected Corporate Harassment?**
Region 8: Rudra Choudhury, Esq.; Supervisory Attorney, National Labor Relations Board; Cleveland
Union: Jessica Rutter, Esq.; Assistant Director, Legal Department, American Federation of Teachers (AFT); Washington DC
Management: Jeffrey R. Vlasek, Esq.; BakerHostetler; Cleveland

12:15 **Lunch (provided)**

12:45 **Rules, Rules, and More Rules? Rulemaking and Other Developments in Representation Under the Act**
- Employee v. student status
- Charter/religious schools
- Issue organizing
- Election issues
- Rulemaking per August NPRMs

Management: Philip A. Miscimarra; Former Chair, National Labor Relations Board; Partner, Morgan Lewis; Washington DC
Union: Kristin S. Watson, Esq.; Cloppert, Latanick Sauter & Washburn; Columbus

1:30 **Identifying Employee Activity: Concerted, Protected, Both or Other?**
- Walmart
- Alstate Maintenance LLC
- Electrolux
- And more

Region 8: Nora F. McGinley, Esq.; Supervisory Field Examiner, National Labor Relations Board; Cleveland
Union: Pamela Newport, Esq.; Branstetter, Stranch & Jennings, PLLC; Cincinnati
Management: Kurt G. Larkin, Esq.; Hunton Andrews Kurth LLP; Richmond, Virginia

2:30 **Break**

2:45 **General Counsel Update with Q & A**
NLRB: Alice B. Stock, Esq.; Deputy General Counsel, National Labor Relations Board; Washington DC
Management: Nelson D. Cary, Esq.; Vorys, Sater, Seymour and Pease LLP; Columbus
Union: Joseph E. Kolick, Esq.; General Counsel, International Union of Painters and Allied Trades, AFL-CIO (IUPAT); Hanover, Maryland

3:45 **Hot Topics, Including:**
- Access issues
- Mandatory arbitration
- Collective bargaining
- Post-CBA issues
- DFR

Region 9: Eric A. Taylor, Esq.; Supervisory Attorney, National Labor Relations Board; Cincinnati
Union: Julie C. Ford, Esq.; Dell Jansen and Ford; Dayton
Management: George S. Crisci, Esq.; Zashin & Rich Co., LPA; Cleveland

4:45 **Program Concludes**

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From: Emanuel, William
To: (b) (6)
Subject: FW: OSBA NLRB Seminar
Date: Wednesday, November 20, 2019 4:36:59 PM
Attachments: FINAL NLRB Update 11.8.19.docx

(b) (6)

It is my understanding that you will ask me questions about each of these cases, and I will respond. Is that correct?

From: (b) (6) @hrpolicy.org> **On Behalf Of** (b) (6)
Sent: Wednesday, November 13, 2019 9:31 AM
To: Emanuel, William <William.Emanuel@nlrb.gov>
Subject: OSBA NLRB Seminar

Attached is an NLRB Update for the OSBA Seminar.

Thanks,

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Direct: (b) (6) | Cell: (b) (6) @hrpolicy.org
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NLRB UPDATE

NLRB activity, through both adjudication and rulemaking, has picked up considerably over the last few months. Outlined below is an update of significant Board decisions and rulemaking initiatives during this time period.

BOARD DECISIONS

- *The Boeing Company*, 368 NRLB No. 67 (Sept. 9, 2019) – **Bargaining Units**
    - The Board applied and clarified the traditional community-of-interest standard for determining bargaining units, ruling that a petitioned-for-unit at Boeing's South Carolina plant that was limited to only two job classifications within a production line was not an appropriate unit.

- *Velox Express, Inc.* – 368 NLRB No. 61 (Aug. 29, 2019) – **Misclassification**
    - The Board held that employers do not violate the National Labor Relations Act ("NLRA" and "Act") solely by misclassifying employees as independent contractors. While this decision generated significant media attention due to the emerging gig economy context, it is important to note that this decision merely reaffirmed long standing precedent that misclassification **alone** does not constitute an unfair labor practice. Employers, however, who intentionally misclassify employees, however, to avoid coverage of the NLRA will, in all likelihood, be found to have violated the Act, and may also have problems under other labor statutes such as the Fair Labor Standards Act for failing to pay overtime at the proper rate.

- *M.V. Transportation, Inc.*, 368 NLRB No. 66 (Sept. 10, 2019) – **Employer Unilateral Changes to Contract**
    - The Board adopted the "contract coverage" standard for determining whether a unionized employer's unilateral change in a term or condition of employment violates the NLRA. The Board abandoned its existing "clear and unmistakable waiver" standard, under which virtually any employer's unilateral change violates the NLRA unless a contractual provision unequivocally and specifically referred to the type of employer action at issue. Under the new "contract coverage" standard, the Board will examine the plain language of the CBA to determine whether the change made by the employer was within the or scope of contractual language granting the employer the right to act unilaterally. This decision is especially important for employers that may need to make modifications in their benefit plans during the term of a collective bargaining agreement.

- *UPMC*, 368 NLRB No. 2 (Jun. 14, 2019) & *Kroger LP*, 368 NLRB No. 64 (Sept. 6, 2019) – **Access to Employer Private Property**
    - In a pair of cases, the Board significantly restricted union access to private employer property, supplying employers with powerful tools to combat prohibited solicitation and related activities on their premises. For example, under a 37-year-old precedent, employers were required to allow nonemployee union reps access to public areas of their property, such as dining areas or cafeterias, for solicitation and distribution purposes.
        - In *UPMC*, the Board held that employers **do not** have to allow nonemployees access to such areas for such purposes, provided they enforce their no solicitation/no distribution policies in a consistent and nondiscriminatory manner.
        - In *Kroger*, the Board held that an employer could lawfully eject nonemployee union reps soliciting petition signatures from a shared shopping center parking area.
        - *UPMC* and *Kroger* - This pair of cases represents a significant expansion in employer rights to eject nonemployee union personnel from their private property. These holdings create a new Board standard in which an employer can bar non-employees from their property so long as the employer policy is nondiscriminatory for activities that "*are similar in nature*." Thus, an employer could bar nonemployees from their property if they are engaging in picketing or boycotts, even if the same policy allowed for charitable groups to solicit, since the two activities are not similar in nature.

- *Cordua Restaurants, Inc.*, 368 NLRB No. 43 (Aug. 14, 2019) – **Arbitration Agreements**
    - This was the first Board decision to address the mandatory arbitration agreements since the Supreme Court's 2018 ruling in *Epic Systems v. Lewis*, which held that class and collective action waivers in mandatory arbitration agreements do not violate the NRLA. In *Cordua*, the Board held that:
        - Employers are not prohibited under the National Labor Relations Act (NLRA) from informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge.
        - Employers, however, are not prohibited under the NLRA from promulgating mandatory arbitration agreements in response to employees opting in to a collective action under the Fair Labor Standards Act or state wage-and-hour laws.
        - Employers are prohibited from taking adverse action against employees for engaging in concerted activity by filing a class or collective action, consistent with the Board's long-standing precedent.

- *Wendy's Restaurant*, 368 NLRB No. 72 (Sept. 11, 2019) – **Arbitration Agreements**

- In a supplemental decision, the Board held that the arbitration agreements a Wendy's franchisee makes employees sign are valid because the agreements have a "savings clause" notifying workers that the agreements do not prevent them from filing a complaint or charge with an administrative agency such as the NLRB. The decision provides clarity for employers on how to properly draft arbitration agreements so as to make clear that despite mandatory arbitration, employees still have recourse through administrative agencies such as the NLRB.

- *General Motors LLC*, 368 NLRB No. 68 (Sept. 5, 2019) – **Offensive Language in the Workplace**
  - In this ongoing case, the Board recently invited briefs on whether the Board should reconsider its standards for profane outbursts and offensive statements of a racial or sexual nature in the workplace. The current standard as applied has resulted in multiple decisions in which extreme language was held to be protected by Section 7 of the NLRA. While this case is months away from being resolved, it is notable that the Board is considering loosening employee speech protections and allowing employers to have more latitude in ensuring decorum in the workplace. The ultimate holding in this case may also better align requirements of Title VII and the NLRA in situations where racially offensive language is used in the workplace and in strike situations.
- *Caesars Entertainment Corp.*, 2018 WL 3703476 (Aug. 1, 2018) – **Use of Employer Email**
  - In this ongoing case, the Board invited briefs in August of 2018 on whether the Board should overturn the legal standard articulated in *Purple Comms.*, 361 NLRB 1050 (2014), in which the Board allowed employee use of employer email for union business, prohibiting employers from imposing limitations on use of its email systems.
- *Walmart Stores*, 368 NLRB No. 24 (Jul. 25, 2019) – **Intermittent Strikes**
  - In this decision, the Board held that the employees had participated in an unprotected intermittent strike because a stipulation admitted that the stoppage, the third in a series of strikes, was pursuant to a strategy to strike, return to work, and strike again in support of the same goals. The group of employees went on several strikes lasting one to six days over a three year period, culminating in 54 employees being disciplined or discharged for violating Walmart's attendance policy. The Board reversed the ALJ – who had found the striking activity to not be intermittent and thus protected activity – and held that the ultimate inquiry in determining whether or not a strike is "intermittent" is "whether the work stoppage arose pursuant to a strategy to use a series of strikes in support of the same goal." The decision provides more clarity to employers on how the Board will evaluate whether striking activity is "intermittent" and thus unprotected by the NLRA.

DIVISION OF ADVICE

- The Board's Division of Advice recently released three guidance memos – related to cases in 2013, 2015, and 2018 – concerning social media policy, arbitration, and financial information disclosure during collective bargaining.
    - The first memo concluded that a rehab center and nursing home's social media policy for its employees was illegal, because it blocked workers from posting any information or rumors about the employer that were either false or inaccurate, which could chill employees' willingness to freely discuss concerns about their terms and conditions of employment.
    - The second memo concluded that a car dealership illegally tried to limit workers' ability to collectively pursue claims in arbitration that they weren't properly paid overtime.
    - The third memo concluded that an NBC affiliate illegally refused to provide its union with financial information about the company during collective bargaining talks.
- In November of 2019, Associate General Counsel for the Division of Operations-Management Beth Tursell issued a guidance letter to NLRB regional offices laying out a procedure by which charges alleging employers of violating the NLRA by unilaterally changing the job conditions of its employees could be resolved through arbitration. The letter is related to the Board's decision in *MV Transportation*, in which the Board eased the standard for whether an employer violates the Act by making such unilateral changes. According to Tursell's letter, when workers file charges with the NLRB alleging their employers violated the NLRA by unilaterally changing job conditions (i.e. without the union's consent), officials should defer to arbitration if one of the parties requests it under the *Dubo* doctrine which prescribes deferral when there is a "reasonable chance the grievance machinery will resolve the dispute or put it at rest. But even where the union has not requested arbitration, "regions should consider whether deferral would nevertheless be appropriate under the Board's *Collyer* deferral doctrine," under which unions can be made to arbitrate disputes that are covered by an arbitration process that culminates in binding resolution. Only where both the employer and the union oppose arbitration, according to the letter, should the Board pursue the charge through the normal complaint process. This guidance letter likely increases the likelihood that charges of unilateral changes will be resolved through arbitration.

RULEMAKING

A. **NPRMs**

- Union Election Procedures (Aug. 12, 2019)
    - The Board published a Notice of Proposed Rulemaking on August 12, 2019, proposing three amendments to its current election rules and regulations in the interest of expanded employee free choice.
        - **Blocking Charge Policy**: elections would no longer be blocked by pending unfair labor practice charges, but ballots would be impounded until charges are resolved. The current blocking charge procedure has

often resulted in decertification petitions being blocked from an election for a substantial period of time.

- **Voluntary Recognition Bar**: for voluntary recognition under Section 9(a) to bar a subsequent representation election – and for a post-recognition CBA to have contract-bar effect – unit employees must receive notice that voluntary recognition has been granted and a 45-day period must be provided to employees to permit them to file an election petition to challenge the voluntary recognition.
- **Section 9(a) Recognition in the Construction Industry**: in the construction industry, proof of a Section 9(a) relationship will require positive evidence of majority employee support and cannot be based on contract language alone.

- Joint Employer (Sept. 13, 2018; commenting period closed Feb. 11, 2019)
  - The Board published a Notice of Proposed Rulemaking regarding the standard for determining joint employer status. The public comment period closed in February 2019. The proposed rule requires that before an entity can be found to be a joint employer under the NLRA, evidence must establish that such entity had actual, direct and immediate control over the essential terms and conditions of employment of the employees in question. A final rule on this controversial topic will likely arrive before the end of the year.
- Jurisdiction – Nonemployee Status of University and College Students Working in Connection with Their Studies (Sept. 23, 2019)
  - The Board published a Notice of Proposed Rulemaking on September 23, 2019, proposing a regulation establishing that students who perform any services for compensation, including, but not limited to, teaching or research, at a private college or university in connection with their studies are not "employees" under the NLRA.

B. **On the Rulemaking Agenda** (May 22, 2019)

- Representation Case Procedures
  - The Board, in its rulemaking agenda published in May, indicated that it would make substantial changes to the union-friendly election rules promulgated by the Obama-era Board in 2014. The 2014 changes assist unions in their organizing campaigns by establishing an accelerated time period for an election after a petition has been filed, and by requiring voter eligibility issues to be resolved.

- Access to Employer's Private Property
  - The Board's published rulemaking agenda also indicated an intent to initiate rulemaking regarding the standards for access to an employer's private property. A proposed rule would likely mirror the recent Board decisions in *UPMC* and *Kroger* and significantly limit nonemployee access to employer private property. The Board may also seek to clarify the rights of off-duty

employees to come onto their employer’s property, and when such access can be denied or restricted.

From: Emanuel, William
To: Zick, Lara S.
Cc: Free, Douglas
Subject: OSBA Outline
Date: Friday, November 22, 2019 3:22:00 PM

Lara,
When you have time, (b) (5)
(b) (5)

Also, (b) (5)
(b) (5)

From: Emanuel, William
Sent: Friday, November 22, 2019 2:55 PM
To: (b) (6) @hrpolicy.org>
Subject: OSBA Outline

(b) (6)

Here is a preliminary outline of the topics that I plan to cover at the conference. Please let me know if you have any suggestions. It is my understanding that the format will be that you will ask questions about each of the topics and I will respond.

RULEMAKING AGENDA

1. Joint employer standard

2. Representation case procedures

3. Access to an employer's property

4. Blocking charges, voluntary recognition, and Section 9(a) relationships in the construction industry

5. Student employees

BOARD DECISIONS

1. Access to an employer's property by nonemployee union organizers

--UPMC, 368 NLRB No. 2

--Kroger Limited Partnership, 368 NLRB No. 64

2. Access to an employer's property by employees of a contractor ("licensee" in this case)

--Bexar County Performing Arts Center, 368 NLRB No. 46

3. Arbitration agreements

--Cordua Restaurants, Inc., 368 NLRB No. 43

--Briad Wenco, LLC dba Wendy's Restaurant, 368 NLRB No. 72

4. Bargaining units

--The Boeing Company, 368 NLRB No. 67

5. Intermittent strikes

--Walmart Stores, Inc., 368 NLRB No. 24

6. Misclassification of employees as independent contractors

--Velox Express, Inc., 368 NLRB No. 61

7. Contract coverage standard

--MV Transportation, Inc., 368 NLRB No. 66

INVITATION FOR BRIEFS

1. Offensive language in the workplace

--General Motors LLC, 368 NLRB No. 68

2. Use of employer email

--Caesars Entertainment Corporation, 28-CA-060841

From: (b) (6)
To: Emanuel, William
Cc: Ring, John
Subject: Re: OSBA Outline
Date: Thursday, November 28, 2019 7:32:30 PM

Thanks Bill- also Happy Thanksgiving to you (b) (6)

Sent from my iPhone

On Nov 28, 2019, at 10:30 AM, Emanuel, William <William.Emanuel@nlrb.gov> wrote:

(b) (6)

Here is a revised outline, which includes the small number of changes we had agreed to previously and some minor edits. John will take it from here. (b) (6) I hope that you (b) (6) have a Happy Thanksgiving.

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--Prime Healthcare, 368 NLRB No. 10

--Cordua Restaurants, Inc., 368 NLRB No. 43

--Briad Wenco, LLC dba Wendy's Restaurant, 368 NLRB No. 72

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6. Independent contractors

--SuperShuttle, 367 NLRB No. 75

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